P. W. Supermarkets, Inc. *and* **Alfonso Perez.** Case 32-CA-2974

4 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 30 September 1981 Administrative Law Judge Maurice M. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found, and we agree, that the Respondent's assistant manager did not threaten Alfonso Perez with discharge if he joined the Union. The judge also found, however, that when the Respondent discharged Perez and fellow employee John Scheiderer as a result of its decision to subcontract the bakery cleanup work previously performed by Perez and Scheiderer, the Respondent violated Section 8(a)(3) and (1). For the reasons set forth below we find that the judge erred.

The facts surrounding the discharge of Perez and Scheiderer are not in dispute and are fully set forth by the judge. In essence, the Respondent was involved in two concurrent developments affecting its bakery cleanup employees, Perez and Scheiderer, at its store number 5. The first development commenced in mid-April 1980, when two cleanup workers at the Respondent's store number 6 filed a grievance seeking a higher wage rate and inclusion in the pension and health and welfare plans. From its inception, the parties recognized that the store number 6 grievance was applicable to all bakery cleanup employees, including Perez and Scheiderer at store number 5.[1] It appears that the pension and health and welfare aspect of the grievance was resolved quickly, in that the Respondent commenced contributions for its bakery cleanup employees, including Perez and Scheiderer, for the 25 May through 21 June 1980 pay period. Regarding the wage claim, the parties met 18 June 1980 but did not reach an agreement. On 1 July 1980 the Respondent offered a compromise wage rate of $4.60 per hour (up from $3.35). The Union confirmed settlement at the $4.60 rate by letter dated 22 July 1980. The new rate commenced 20 July and the formal agreement was signed 29 July. The Respondent's controller, Sarraco, was the management official involved in the grievance process.

During the period outlined above, the Respondent was also exploring the feasibility of subcontracting its bakery cleanup work at store number 5. It appears that the concept of subcontracting arose in May 1980 when Vitola, a baker at store number 5, made the suggestion to Store Manager Blum. Blum relayed the suggestion to Sarraco who directed Blum to solicit bids. Blum solicited a bid from Top Notch, a cleaning firm, in early June 1980. Blum then went on a 2-week vacation and, on his return, solicited a bid from Shine Company (Shine), the firm that already did general cleanup work at store number 5. In early July, Shine submitted a bid of $460 per month which was communicated to Sarraco.

Upon receipt of the Shine bid, Sarraco engaged in a relative cost analysis between subcontracting and retention of Perez and Scheiderer. Sarraco did not recall and the judge did not find whether Sarraco utilized the $3.35 per hour plus fringes figure or the compromise rate of $4.60 per hour plus fringes in calculating the cost of retaining Perez and Scheiderer. In any event, the judge found the cost savings of subcontracting over retention of the two employees were substantial.[2]

Sometime prior to 15 July 1980 Sarraco instructed Blum to accept the Shine bid effective 1 August 1980 and discharge Perez and Scheiderer. On 31 July Blum informed Perez and Scheiderer that their services were no longer needed because a janitorial service had been contracted to take over their work. They were told that they could work through 2 August 1980, but each decided to leave 31 July.

Against this background of coinciding events, the judge concluded that the decisive factor in the decision to subcontract the bakery cleanup work at store number 5, and thereby terminate Perez and Scheiderer, was the substantial cost increase engendered by the grievance settlement. From this fact he posited that the Respondent's discharge of Perez and Scheiderer unlawfully denied employees the economic gains achieved through the protected actions of collective bargaining, i.e., the grievance process. According to the judge, the Respondent's reliance on such economic factors in deciding to discharge two employees was inherently destructive of important employee Section 7 rights and,

[1] Although they were beneficiaries of the grievance, it is clear that Perez and Scheiderer played no role in the initiation or processing of the grievance.

[2] The judge found that the savings ranged from $8,000 to $10,000 per year.

therefore, violated Section 8(a)(3) even though there was no evidence of union animus. We cannot agree.

We believe a proper analysis begins with the undisputed evidence that as a result of the Respondent's dissatisfaction with the quality of cleanup work it was receiving at store number 5, it began to explore alternative arrangements, including subcontracting of the cleanup work. As one might expect a reasonably prudent businessman to do, Sarraco engaged in a relative cost analysis between subcontracting and the retention of two employees. In calculating the cost of retaining Perez and Scheiderer, Sarraco, of course, utilized the then current employment costs which included, at least, the lion's share of the increased benefits achieved in the grievance process.[3] It is undisputed that the analysis demonstrated the subcontracting option to be substantially more attractive from a cost standpoint. Accordingly, on the basis of all of the information available, and relying primarily on the substantial cost savings, Sarraco decided to subcontract the bakery cleanup work at store number 5 and discharge Perez and Scheiderer.

Against this background, we note that the record is barren of evidence indicating any union animus or overt intent to discriminate against employees on the basis of their union activities. Thus, the judge found no merit in the allegation that the Respondent threatened Perez with discharge if he joined the Union. In addition, there is no indication in the record that the Respondent's longstanding relationship with the Union has been anything less than harmonious. Indeed, the grievance involved here was settled amicably on terms favorable to the Union. Finally, in this regard, apart from the allegation of unlawful discharge sub judice, there is no allegation or evidence of unlawful conduct or hostility toward the Union in the Respondent's dealings with Perez, Scheiderer, or the Union,[4] including the employees who had initiated the grievance.

Accordingly, at least on its face, the Respondent's discharge of Perez and Scheiderer appears to have been predicated on traditional and legitimate business grounds, i.e., the achievement of substantial cost saving through the subcontracting of work that was being performed in an unsatisfactory fashion. The question becomes, therefore, whether the Respondent's action was so inherently destructive of employee Section 7 rights that the Respondent's unlawful motive and intent can be presumed in the absence of any evidence of unlawful intent. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).[5] The judge answered this question in the affirmative. We disagree inasmuch as his analysis suffers several fundamental flaws.

Initially, we note that the Board has often found discharges pursuant to an employer's decision to subcontract work not to be violative of Section 8(a)(3) when the employer has demonstrated that its decision was predicated on economic or other legitimate business considerations.[6] Thus, it would not appear that an employer's decision to subcontract work is itself an act inherently destructive of important employee rights.[7]

More fundamentally, however, the judge's analysis overlooks the sine qua non for an 8(a)(3) violation, namely, a causal connection between an employee's protected union activities and an action by the employer detrimental to the employee's tenure or terms and conditions of employment.[8] In cases such as *Great Dane*, the connection was obvious—eligible employees who had not engaged in a strike received vacation benefits while eligible employees who struck did not. Thus, the employees' act of engaging in union activities caused the detriment to their terms and conditions of employment. In other cases, this causal connection may be less obvious, but it is no less required in properly finding a violation of Section 8(a)(3).

In the instant case, there is absent the necessary causal relationship between union activities and an action detrimental to employee tenure. Thus, it was not the grievance that caused Perez and Scheiderer to be discharged. Instead, the discharges were caused by the Respondent's discovery that it could have the work in question performed at a substantially lower cost and an increased level of effectiveness. To be sure, the grievance *affected* the outcome of the Respondent's cost analysis, but to at-

[3] We agree with the judge that it is not necessary or decisive to determine whether Sarraco calculated costs using the old wage rate or the new wage rate, inasmuch as he plainly factored in the increased health and welfare and pension costs which represent the bulk of the increased costs.

[4] Significantly, there is no allegation that the Respondent's decision to subcontract violated Sec. 8(a)(5). The Union registered no objection to the discharges and, in fact, conceded the Respondent's right to subcontract the bakery cleanup work at its other locations as well.

[5] Application of the *Great Dane* principle does not, of course, eliminate the requirement of finding unlawful motive or intent in determining that Sec. 8(a)(3) is violated. *Great Dane* simply states that certain employer actions are so manifestly discriminatory against employees engaging in union activities that the unlawful motive will be presumed.

[6] *Liberty Homes*, 257 NLRB 1411 (1981); *W. G. Best Homes Corp.*, 253 NLRB 912, 921 (1980); *Park Furniture Mfg. Co.*, 199 NLRB 912 (1972); *Fibreboard Corp.*, 130 NLRB 1558 (1961), affd. 379 U.S. 203 (1964).

[7] See *Liberty Homes*, 257 NLRB 1411 (1981), where an administrative law judge applied *Great Dane* in finding that the employer's discharge of employees pursuant to a decision to subcontract was inherently destructive of employee rights and violative of Sec. 8(a)(3). In reversing the administrative law judge, the Board stated: "The Administrative Law Judge's rationale is ambiguous given his discussion of, and apparent reliance on [*Great Dane*]. We do not consider that decision germane." 257 NLRB 1141 fn. 2.

[8] See *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965); *Wright Line*, 251 NLRB 1083 (1980).

tempt to connect causally the grievance with the discharges is to mistake a link in the causal chain for the cause itself.

In addition, although employees often benefit from the collective-bargaining process, they can still be subject to detrimental action taken by the employer in achieving legitimate business objectives. As the Supreme Court has stated:

> [We] have consistently construed . . . section [8(a)(3)] to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership.

American Shipbuilding Co. v. NLRB, 380 U.S. 300, 311 (1965). Indeed, anytime a union secures economic gains through the collective-bargaining process, it runs the calculated risk that the increased costs may eventually compel the employer to adopt cost-motivated changes such as layoffs or subcontracting.[9]

These concepts are equally applicable in examining grievances inasmuch as the grievance process is simply an aspect of collective bargaining. Thus, in *Monarch Machine Tool Co.*, 227 NLRB 1880 (1977), the union processed and won a grievance over the startup time for a third shift at the employer's plant. The employer told the union that insistence on the awarded startup time would render operation of a third shift "economically unfeasible" and would result in elimination of the shift. The union adhered to its arbitration position and even subjected the issue to a membership vote with the employees voting to insist on the arbitration awarded starting time. The employer carried out its promise, shut down the third shift, and laid off employees. The administrative law judge dismissed the allegation that the employer's action violated Section 8(a)(3), holding that the elimination of the shift resulted from economic considerations and not from a desire to retaliate against employees for their protected grievance activities. A unanimous panel of the Board affirmed the administrative law judge.

Similarly, in *McLoughlin Mfg. Corp.*, 164 NLRB 140 (1967), the employer closed its plant in large part because of the onerous provisions contained in the collective-bargaining agreement. In dismissing the alleged 8(a)(3) violation, the Board held (164 NLRB at 141):

> [W]e cannot conclude that because a condition of employment imposed by a collective-bargaining agreement was the economic "straw" which "tipped the scale" in the decision to close, Respondents' motive for closing was to defeat employees' statutory bargaining rights and, therefore, was unlawful. [Footnote omitted.]

This same principle is fully applicable here.[10]

In conclusion, we find that the Respondent discharged Perez and Scheiderer for legitimate business reasons. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

[9] "[T]here is nothing in the Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes." *American Shipbuilding Co. v. NLRB*, 380 U.S. at 313.

[10] See also *Dove Flocking & Screening Co.*, 145 NLRB 682, 694 (1963); *Lori-Ann of Miami*, 137 NLRB 1099 (1962).

Indeed, if a contrary rule applied to an employer's action in such circumstances, then any time an employer subject to a collective-bargaining agreement discharged an employee for cost reasons alone, it would violate our Act since the employer would of necessity be relying on costs engendered by the collective-bargaining process.

Many of the cases cited in this opinion also discuss whether particular employer decisions were subject to a duty to bargain. We do not here consider that issue. See fn. 4, supra.

DECISION

STATEMENT OF THE CASE

MAURICE M. MILLER, Administrative Law Judge. Upon a charge filed on August 14, 1980, and duly served, the General Counsel of the National Labor Relations Board caused a complaint and notice of hearing dated September 26, 1980, to be issued and served on P. W. Supermarkets, Inc., designated as Respondent. Therein, Respondent was charged with the commission of unfair labor practices within the meaning of Section 8(a)(3) and (1) of the National Labor Relations Act. 61 Stat. 136, 73 Stat. 519, 88 Stat. 395. Respondent's answer, duly filed, conceded certain factual allegations within the General Counsel's complaint, but denied the commission of unfair labor practices.

Pursuant to notice, a hearing with respect to this matter was conducted before me on March 19, 1981, in San Jose, California. The General Counsel and Respondent were represented by counsel. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence with respect to pertinent matters. Since the hearing's close, the General Counsel's representative and Respondent's counsel have filed briefs; these briefs have been duly considered.

On the entire testimonial record,[1] documentary evidence received, and my observation of the witnesses, I make the following

[1] Certain corrections of the record transcript, required to render it more accurate and comprehensible, will be found listed within Appendix B attached [omitted from publication].

FINDINGS OF FACT

I. JURISDICTION

Respondent raises no question, herein, within respect to the General Counsel's present jurisdictional claims. Upon the complaint's relevant factual declarations—more specifically, those set forth in detail within the second paragraph thereof—which Respondent's counsel concedes to be correct, and upon which I rely, I conclude that Respondent herein was, throughout the period with which this case is concerned, and remains, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in business activities affecting commerce, within the meaning of Section 2(6) and (7) of the statute. Further, with due regard for presently applicable jurisdictional standards, I find assertion of the Board's jurisdiction in this case warranted and necessary to effectuate statutory objectives.

II. THE LABOR ORGANIZATION CONCERNED

Bakery, Confectionery and Tobacco Workers International Union Local Union No. 24, AFL-CIO-CLC, designated as the Bakery Workers or Local No. 24 within this decision, is a labor organization, within the meaning of Section 2(5) of the Act, which admits certain of Respondent's employees to membership.

III. THE UNFAIR LABOR PRACTICES CHARGED

A. *Issues*

This case presents two relatively simple, straightforward questions for resolution. The General Counsel contends that—while Bakery Workers Union representatives were pressing a grievance bottomed upon Respondent's purported failure to comply with contractual commitments regarding the compensation and fringe benefits due certain part-time bakery cleanup workers—the firm committed unfair labor practices.

First: The General Counsel charges that Respondent's assistant manager, at one of the firm's stores, told a cleanup worker he would be discharged if he became a Bakery Workers Union member.

Second: The General Counsel charges that Respondent decided to subcontract bakery cleanup work, within a single one of several stores with bakery departments, and that, consequent upon that decision's implementation, Respondent laid off two bakery cleanup workers.

The General Counsel contends that these workers were laid off, contrary to the statute, because Respondent's decision to subcontract bakery cleanup work, which they had been performing, derived—particularly—from the firm's desire to preclude foreseeably higher costs, which their continued employment would entail, should the firm be required to comply with a collective-bargaining contract's provisions regarding their compensation and fringe benefit entitlements. By way of rejoinder, Respondent denies: *First*, that Store No. 5's designated assistant manager, purportedly responsible for threatening one bakery cleanup worker's discharge, possesses supervisory status, within the meaning of the statute. *Second*, Respondent denies, further, that any threat of discharge was made. Regarding its subcontracting decision, and consequently layoffs, Respondent denies that union considerations, or foreseeably higher costs consequent upon its prospective compliance with contractual commitments, were motivating factors.

B. *Facts*

1. Background

a. *Respondent's business*

Respondent operates six grocery supermarkets within Santa Clara County, California; three of these have bakery departments, within which pastries and baked goods are produced for retail sale. This case, particularly, concerns a situation which developed at Respondent's No. 5 store, with a Blossom Hill Road, San Jose location.

Throughout the period with which this case is concerned, Mario Blum was Respondent's store manager at Blossom Hill Road; Floyd Wedel functioned as his assistant manager. The store maintained a grocery department, bakery department, and meat department; the latter contained a so-called deli section. These departments were staffed by "between fifty and seventy-five" employees. Respondent's bakery department complement at Blossom Hill Road—during the period with which this case is concerned—compassed four journeyman bakers including the bakery foreman or head baker, between four and six sales clerks, and two part-time bakery cleanup workers.

b. *Respondent's relationship with the Bakery Workers Union*

The firm, currently, recognizes and maintains collective-bargaining relationships with three labor organizations. Since approximately 1952–1954, Respondent's grocery clerks, throughout its supermarket chain, have been represented by a labor organization currently designated as United Food and Commercial Workers, Local 428, AFL-CIO; the firm's current "Food Store Contract" negotiated with that organization runs for 3 years, with a February 28, 1983 termination date. (Bakery sales clerks, within Respondent's three stores with bakery departments, are covered by the contract designated.) Respondent maintains a current collective-bargaining relationship, also, with Meat Cutters Union, Local 506, which—likewise—dates back to some 1952–1954 commencement date, never specified for the present record.

The firm's three store bakery departments had been initiated, and had commenced operations, sometime during 1968; since their formation, Respondent has maintained a collective-bargaining relationship with Bakery, Confectionery & Tobacco Workers International Union, Local Union No. 24, AFL-CIO-CLC, covering bakery department personnel. Throughout the period with which this case is concerned, their wages, hours, and conditions of work have been governed by a collective-bargaining contract bearing the captioned designation "In-Store Bakery Retail Agreement" which had been negotiated with Local Union No. 24 particularly—for a 3-year, 1978–1981, term—by a trade group, Food Employers Council, Inc., functioning in Respondent's behalf.

Inter alia, Local No. 24's contract sets minimum hourly wage rates effective 1978, for bakery foreman, journeyman bakers, bench hands, helpers, apprentices, pot washers, and cleanup workers. Provisions were made for successive hourly rate increases 3 months later, 1 year later, and thereafter at 6-month intervals throughout the balance of the contract's term. (For potwashers employed, on the designated contract's effective date, a $6.406 hourly rate effective July 3, 1978, was established; potwashers hired after October 9, 1978, however, were to be paid a $4.605 entry level rate, with periodic increases provided thereafter, as previously noted. Cleanup workers were to receive $3.15 per hour, effective July 3, 1978; hourly rates for these workers, were contractually scheduled to rise by defined sums, over two *yearly* intervals, reaching $3.35 by July 6, 1980.)

Further cost-of-living wage increases "if applicable" for all employees contractually covered were likewise *promised* within the Bakery Workers contract. The agreement, however, contained a further provision—possibly inconsistent therewith—that contractually specified cleanup classification three-step wage rates "shall not be affected by any other wage increases" during the contract's 3-year term.

Contractual fringe benefits provided within Local No. 24's agreement compassed a multifaceted health and welfare program, for which employees who had worked 83 hours monthly were considered eligible; the program as it existed on June 30, 1978, required monthly contributions of $99.07 from Respondent, per eligible employee. Pension and retirement benefit provisions, for "each employee working in job classifications" contractually covered, likewise required company contributions. Throughout the first 7 months of the calendar year 1980 period, with which this case is concerned, Respondent was committed to provide pension plan contribution payments of $5.84 covering each full working day, or portion thereof, for which a contractually covered employee had received pay, but not more than $29.20 weekly for any single worker.

c. *Respondent's bakery department cleanup workers*

Prior to January 1980, Respondent did not consider bakery department cleanup workers, within its three stores which maintained such departments, employees covered by the firm's broadly drafted Bakery Workers Union contract. The record reveals that such workers were being paid contractually specified "cleanup worker" wage rates—concededly, however, no health and welfare or pension plan contributions were being remitted on their behalf. (According to Paul Sarraco, Respondent's controller, his firm *believed* that—consistently with the designated contract's presumptive intent—cleanup workers, particularly, were to be considered contractually covered, but *only* when employed within separately maintained wholesale bakery establishments; Respondent did not consider such workers, within its relatively small supermarket bakery "departments" specifically, beneficial members of Local No. 24's contractually protected group.)

While a witness, the Union's secretary-treasurer Felisa Castillo testified that she had not, personally, discovered Respondent's utilization of bakery cleanup workers until "probably" sometime late during calendar year 1979; the record warrants a determination, which I make, that no compliance with her organization's contractually mandated union-security provisions, as far as Respondent's cleanup workers were concerned, had—prior thereto—been demanded or required. None had, I find, become union members.

2. Challenged discharges

a. *Respondent's cleanup workers file a grievance*

Sometime in January or February 1980, two cleanup workers at Respondent's Store No. 6, Kirk Mueller and Ken Turner, became union members. At some time, subsequently, they spoke with union business representative Thomas Wake; Mueller and Turner reported they had "been made aware" that they were currently covered under Local No. 24's collective-bargaining agreement, and that they should "possibly" be receiving higher pay. When the business representative, thereupon, investigated their situation, he discovered that both men were—inter alia—doing pot washing work, in conjunction with their regular "cleanup" tasks; further, he discovered that they were not being listed as covered workers, within Respondent's monthly health and welfare or pension plan transmittals, and that required contributions, on their behalf, were not being made.

Shortly following a consequent telephone conversation with Controller Sarraco, Wake dispatched a letter, dated April 16, 1980, wherein Respondent was formally notified that Mueller and Turner had filed wage claims, bottomed on their performance of "potwasher" duties, while receiving the contractually specified "cleanup" pay rate, merely. Sarraco was, further, reminded that—pursuant to Respondent's Bakery Workers contract departmental employees who had worked 83 hours, within a given month, whether or not they held union membership, were considered qualified for health and welfare coverage, and that pension plan contributions were likewise required, on their behalf for "each [8 hour] day" worked. Wake requested a commitment from Respondent, regarding the specific "manner of payment" which would be provided to settle these claims.

b. *Problems at Respondent's Blossom Hill Road store*

Concurrently with these developments, while Local No. 24's grievances—with respect to Mueller's and Turner's claims particularly—were pending discussion and possible resolution, Respondent's Store No. 5 manager, Mario Blum, had become cognizant—so his credible testimony shows—with regard to certain managerial and personnel problems within his particular store's bakery section.

Complainant herein, Alfonso Perez, had been hired for cleanup work within Store No. 5's bakery on December 3, 1979; during the 7-month period which followed—prior to his July 31, 1980 termination hereinafter noted—Perez had worked regular part-time afternoon shifts, averaging, so I find, some 26–28 compensable hours weekly. (While a witness, Perez had—initially—reported

his service time as compassing some 26 hours weekly, spread over 5—but occasionally 6—days. His further testimony, however, would seemingly suggest that he normally worked a 2–5 p.m. shift; such a limited part-time schedule, clearly, would not have provided him with 26 hours of compensable service time within a given calendar week. My determination, herein, with respect to Perez' weekly part-time services, derives—however—from Respondent's subsequently filed reports, regarding his work record, pursuant to which pension plan contributions, required in his behalf, were supposedly calculated. Those reports reveal that—within a 9-week May-July period preceding his termination—Perez worked a total of 252 hours; his services, therefore, averaged some 28 hours weekly.) Within his 7-month period of service, however, Perez had worked with a succession of cleanup worker colleagues, some four of five in number. Their successive periods of service had varied. Respondent's bakery foreman, Fred Vitola, testified—without contradiction—that cleanup workers within his department rarely provided Respondent with "steady" help; sometimes they might remain for 2 months, and sometimes they might "last a week" merely.

Between December 1979 and May 1980, during Perez' period of service, Respondent's Store No. 5 bakery department had been "written up" several times by Santa Clara County health inspectors, for sanitation deficiencies. Respondent's bakery foreman, Fred Vitola, had been—so his credible testimony shows—quite concerned. He had, frequently, provided both Perez and his fellow cleanup worker—whoever that might currently be—with specific directives, verbal or written, regarding "certain things" which would, particularly, have to be cleaned. (Upon occasion, Vitola had returned to Respondent's store, following his daily shift's completion, to show Perez and his colleague precisely *what* had to be done; he had—sometimes—performed required cleanup tasks himself, while demonstrating, for his subordinates, *how* he wanted things done.)

Respondent's current problems, with respect to maintaining cleanliness within Store No. 5's bakery department, had, likewise, been a subject of discussion—so the record shows—between Vitola and Store Manager Blum; they had, I find, considered the store's situation aggravated by frequent personnel turnover, previously noted, within this bakery department's two-man cleanup worker complement. Store Manager Blum had, once, suggested a possible change in personnel policy—for his bakery foreman's consideration—pursuant to which some retired worker—who might be more dependable than the "young people" whom Respondent had, up to that point, been hiring for such work—would be sought.

Conditions within Store No. 5's bakery department were—likewise—discussed by Respondent's bakers. One, Carl Johnson, suggested to Respondent's bakery foreman, I find, that their firm's management might be well advised to consider subcontracting required departmental cleanup work to some janitorial service.

Sometime in May 1980, Foreman Vitola relayed this suggestion to Store No. 5's manager; Blum, thereupon, reported the bakery department's problems, and brought Vitola's suggestion—promptly—to Controller Sarraco's attention. Saracco, so his credible testimony shows, directed Blum to solicit a bid "quotation" from the janitorial service which Respondent's baker, Johnson, had previously recommended. (While a witness, Respondent's controller reported that a janitorial firm, Shine Building Maintenance, was currently providing general cleanup services within Store No. 5, particularly. Sarraco's testimony, herein, warrants a determination—which I make—that he was not really seeking "competitive" bids from other building maintenance services. Rather, he was planning to solicit a bid quotation from the firm which Johnson had recommended for "match-up" purposes merely, so that he could, subsequently, determine whether a parallel quotation, which Shine Building Maintenance would be solicited to proffer, might be "out of line" comparatively.)

Sometime thereafter, during the first week of June 1980, Blum solicited a bid from Top Notch Maintenance Service, pursuant to Sarraco's directive. The janitorial firm gave Respondent's store manager a price quotation; Blum was told that Top Notch would service Store No. 5's bakery department and deli section for $800 per month.

c. *Grievance discussion*

On June 18, Respondent's controller, together with a Food Employers Council representative, conferred with union business representative Wake and secretary-treasurer Castillo regarding the proper, contractually specified wage rate payable for bakery department cleanup work. Though their conference had, originally, been scheduled to discuss the wage rate grievances filed specifically on behalf of Respondent's Store No. 6 cleanup workers, Mueller and Turner, particularly, the conferees—concededly—discussed the wage rates which, consistently with Respondent's current contract, should be paid bakery department cleanup workers within Respondent's three stores wherein such personnel were employed. (The record, herein, suggests, tangentially, that questions with regard to Respondent's further contractual obligations—relative to health and welfare contributions, and pension fund payments, for cleanup workers—had, *otherwise*, been resolved. I so find. The firm's June 1980 contribution report, directed to Bakery and Confectionery Union and Industry International Health Benefits and Pension funds—subsequently prepared on July 9 for a 4-week, May 25–June 21 period—listed four cleanup workers, at least, for whom contributions were, then, being forwarded.)

Local No. 24's representatives claimed they had completed a job study which had revealed—so they reported—that Respondent's bakery department cleanup personnel were spending "approximately 50 percent" of their time washing pots, and 50 percent doing general cleanup work. Respondent's controller, while a witness herein, summarized his firm's contradictory response:

> Our original position was that the higher rate [contractually fixed for potwashers] was not warranted . . . because we had [machine] dishwashers in the store. We really didn't feel that they spent this

> much time washing dishes as the labor study of 50 percent showed, and that we had been doing business for 12 years or so without this problem arising [Interpolations provided to promote clarity].

Sarraco declared his view, in Respondent's behalf, that the contractually specified hourly rate for cleanup personnel—which was, by then, scheduled to rise from $3.25 to $3.35 per hour, within a short time thereafter—should be considered payable. The parties, however, could not resolve any differences; their June 18 session, noted, concluded with no consensus reached.

d. *Respondent's decision to subcontract cleanup work*

Thereafter, shortly following his return from a 2-week June 1980 vacation, Store No. 5's manager requested Respondent's regular janitorial service, Shine Building Maintenance to submit a bid quotation calculated to cover proposed supplemental charges, for bakery department and deli cleanup services, confined to Store No. 5 particularly. Within a short time, presumably during July's first week, Shine Building Maintenance reported its readiness to provide additional cleanup services, covering the store departments noted, for a supplementary $460 monthly charge. (In the meantime, Respondent's management had—through a Food Employers Council representative—suggested to Secretary-Treasurer Castillo, of the Bakery Workers Union, *on or about July 1*, that so-called compromise rate, specifically $4.60 per hour, might be negotiated for bakery cleanup workers whose duties might compass potwashing, within Respondent's three stores with bakery departments.) The janitorial service's bakery department and deli cleanup bid, noted, was transmitted to Respondent's controller, presumably by Store No. 5's manager, promptly following its receipt.

The record, herein, warrants a determination—which I make—that Controller Sarraco, shortly thereafter, prepared some comparative calculations, whereby he sought to determine whether Respondent's possible reliance on Shine Building Maintenance for cleanup services, particularly within Store No. 5's bakery department and deli section, would produce cost savings. His figures, so I find, persuaded him that Shine's retention for such work would significantly reduce Respondent's cleanup costs. (While a witness, Sarraco could not produce documentation with respect to his calculations. Nevertheless, his testimony—which I credit in this connection—reveals that he determined the "average number of hours" which Store No. 5's regular *two-man* bakery cleanup crew could presumably work, weekly, multiplied that figure by their projected hourly rate of pay, factored in Respondent's prospective health and welfare and pension plan contribution costs, for both cleanup workers, and compared his resultant "total cost" figure, should Respondent's current cleanup program be continued, with Shine's proposed $460 monthly charge. Respondent's controller could not recall whether—when making these calculations—he had multiplied the two-man cleanup crew's projected weekly hours by their currently specified contractual $3.35 pay rate, or Respondent's newly proposed $4.60 rate. Upon the present record, however, I am satisfied that—regardless of which hourly rate Sarraco may have employed for computation purposes, when calculating Respondent's prospective costs should its Store No. 5 cleanup crew be retained—his computations produced projected monthly and yearly cost figures significantly higher than Shine Building Maintenance's proposed charges. The controller claimed, while a witness, that—when compared with Respondent's prospective costs should Store No. 5's cleanup workers be paid $4.60 hourly—the firm's possible reliance on Shine's services, alternatively, would produce "approximately" $10,000 in cost savings, yearly; he testified, further, that—with prospective direct costs figured on the basis of Respondent's current $3.35 hourly rate, the firm's possible reliance on Shine's services would produce approximately $8000 in yearly savings. My personal calculations—based on Sarraco's basic "average hours worked" and "hourly rate" data, coupled with relevant contractual provisions which define Respondent's fringe benefit contribution costs, suggest that his claimed cost "savings" represent reasonable projections.)

Sometime shortly before his July 15 departure for a European vacation, Respondent's controller decided to subcontract Store No. 5's bakery department and deli cleanup work to Shine's janitorial service. He notified the service contractor regarding his decision, directed that firm not commence work within the designated departments on August 1, and communicated his decision to Store No. 5's manager. Blum was requested further to notify his store's bakery cleanup workers that their services would no longer be required.

e. *Respondent's cleanup workers are solicited to become union members*

Sometime in July 1980, never specifically designated for the record, Bakery Foreman Vitola received a telephone call—so I find—from a Bakery Workers Union representative. He was requested to ask Store No. 5's cleanup workers whether they would "consider" becoming union members. Vitola's testimony—which I credit in this connection—warrants a determination that he did so. (While a witness, Perez conceded that he had spoken with Respondent's bakers and bakery girls, inter alia, regarding the Union; he proffered no testimony, however, with respect to the substance of these conversations, or precisely when they had taken place. He could not "recall" such conversations; his testimony reflects no recollection regarding Vitola's communication, particularly.)

Shortly thereafter, Respondent's baker/decorator, James "Ted" Mayall, brought two envelopes containing various union membership application forms to Store No. 5; the baker requested Respondent's assistant manager, Floyd Wedel, to make arrangements for their subsequent delivery to Perez and John Scheiderer, Respondent's second bakery cleanup worker, since they would be reporting for duty following the conclusion of Mayall's shift.

Later that afternoon, Respondent's assistant manager requested a bakery sales clerk, Gayle Jacobson, to notify Perez and Scheiderer that Wedel wished to see them in

Store Manager Blum's office. They reported, I find, as requested. (While a witness, Perez could not recall Scheiderer's presence in Blum's office, during his conversation with Assistant Manager Wedel, which ensued. In this regard, Wedel proffered recollections, within my view, merit credence. For various reasons—which will be detailed, subsequently, within this decision—I have, herein, found Perez' testimonial recitals, frequently, less than completely reliable. Specifically, however, with regard to whatever questions the record may raise relative to Scheiderer's presence, I note—particularly—that Respondent's assistant manager, who had been directly requested to deliver *two* union envelopes, would hardly have been likely to entrust such a missive, prepared for Scheiderer, to complainant herein for subsequent transmittal; the suggestion that he did so, necessarily implicit within Perez' testimony, runs counter to logical or reasonable probabilities, within my view.)

Complainant's proffered recollections, with particular reference to his purported conversation with Respondent's assistant manager, on this occasion, merit verbatim recapitulation. As recorded, in relevant part, his testimony in direct examination reads as follows:

> Q. To the best of your recollection, what did Floyd say and what did you say?
>
> A. He gave me two envelopes and said if I joined I was fired. . . .
>
> Q. Okay, do you recall anything else that was stated in your conversation with Floyd?
>
> A. Yes, that it was not Floyd's fault, it was Joe's [Note: presumably Joey Franco [sic], Respondent's management representative, whose precise status was never clarified within the the present record] . . . that is all I can recall.

When subsequently cross-examined, with respect to what Wedel may have said, Perez could recall little more. His further testimony suggests some revised recollections, but provides merely a few circumstantial details.

> Q. And what did he [Floyd] say to you?
>
> A. General talk like Hi, how are you? And then about the Union talk [Note: talk about the Union?] and he said if I joined I would be fired.
>
> Q. You say about the Union talk, what discussion was there either by you or Mr. Wedel . . . about the Union?
>
> A. I don't recall.
>
> Q. The only thing you recall in that entire conversation is Mr. Wedel, or Floyd, allegedly telling you that if you joined you would be fired.
>
> A. Yes. That stood out the most because I told him why give it to me, and he said it is your mail, it is addressed to you . . . . He said if he kept it—in other words, the Union sent it to me, and John. And that is what he said. He said it is your mail. It is yours, you have to take it . . . .
>
> Q. Did you talk to anyone about it?
>
> A. Yes . . . the bakery girls downstairs . . . Mrs. Starrs and Gayle . . . .
>
> Q. And you told those two bakery sales girls that Floyd had just threatened to fire you if you joined the Union?
>
> A. Yes . . . .
>
> Q. All right, now when Floyd allegedly told you if you join you are fired, what did you said to him?
>
> A. I told him that why give me the envelope if you don't want me to join.
>
> Q. And what was Floyd's response to that?
>
> A. It is your mail. Or it is your envelope.
>
> Q. And was that the end of the conversation?
>
> A. Yeah.

Summoned as Respondent's witness, Wedel conceded that Store No. 5's baker/decorator, Mayall, had requested him to give envelopes containing union applications to Perez and Scheiderer, telling him that the Union wanted "these fellows" to become members. When they came to Store No. 5's office, Wedel recalled, he had given them each their separate envelopes, and had told them that the Bakery Workers Union wanted them to join; Respondent's assistant manager thought he had told Perez, further, that it would be "up to him" should be wish to become a union member. Complainant, so Wedel testified, had then queried him with respect to what would happen, should he and Scheiderer join. Respondent's assistant manager recalled him reply that "as far as [he was] concerned" or "as far as [he] knew" nothing would happen. He denied, categorically, that Perez and Scheiderer had been told that, should they join the Union, they would be terminated.

Wedel's denial, with particular reference to Perez' claim that he had been threatened with possible discharge, raises a testimonial conflict—of—course which will be resolved, with due regard for the record considered in totality, hereinafter.

f. *Complainant's reaction*

While a witness, Perez claimed that Wedel's purported threat of discharge had bothered him, and had left him "unsure" with regard to whether he should seek Bakery Workers Union membership. His testimony, previously noted herein, reflects his purported recollection that he had reported the assistant manager's putative threat to Mrs. Starrs and Gayle, Respondent's bakery sales clerk. (Nevertheless, Perez recalled, he had promptly undertaken to compute "what he would be getting" should his coverage, pursuant to the Union's contract, be confirmed. In doing so, he had multiplied his presumptively regular part-time work schedule, compassing 24 hours weekly, by a projected $6 hourly rate; making due allowance for a $20 estimated weekly tax deduction, he had concluded that he would be receiving $124 weekly, or $496 within a 4-week period. According to Perez, his "estimate" that he might be paid $6 per hour, maximally, had been based on alleged "friend's" report; complainant did not, however, name his purported informant.)

Perez did not complete or submit the union membership documents whih Wedel had handed to him. He declared, while a witness, that he had been "told" not to do so. However, some weeks later—shortly before his

July 31 termination, by Respondent's store manager, noted hereinafter—Complainant received a second set of membership application forms, which had been mailed to him. These, so Perez' testimony shows, he completed and returned; he did not, however, forward any dues payment.

g. *The grievance resolution*

On July 22, Food Employers Council dispatched a letter to secretary-treasurer Castillo of the Bakery Workers Union, on Respondent's behalf, purportedly to confirm a settlement *previously* reached between the parties with regard to their dispute concerning the wage claims presented on behalf of Respondent's cleanup personnel. The firm had, so the letter reported, agreed—inter alia—that bakery cleanup workers would be paid $4.60 per hour, commencing with its June 29-July 5 payroll period. Castillo's signed concurrence with the letter writer's summary of their purported "agreement" was solicited.

On July 29, Castillo sent Food Employers Council a fully executed "copy of the agreement" which had been reached regarding the wage claims of Respondent's bakery cleanup personnel.

Respondent's commitment to pay such cleanup workers $4.60 per hour was implemented, however, with the commencement of the firm's regular July 20-July 26 payroll period, with respect to which paychecks were then being prepared.

h. *Discharges*

Consistently with Controller Sarraco's prior directive, Store Manager Blum notified Perez and Scheiderer, on Respondent's next regular payday, July 31, that their services would no longer be required, since they were being replaced by a janitorial service contractor.

Summoned as Respondent's witness, Blum testified that—shortly after 1:30, when Perez and Scheiderer reported for their afternoon's work—he notified them that Respondent would no longer require their services. The store manager declared that—since Respondent's contract with United Food and Commerical Workers required 3 days' prior notice when workers were being terminated—he had given Perez and Scheiderer equivalent notice. They were told, specifically, that they could continue working through their Saturday, August 2, shift. (While a witness, previously, Perez had testified that he was given a July 31 notice, with regard to his termination, at 4:30, shortly before his part-time shift's scheduled conclusion. Further, he declared that Blum had given him 2-week's rather than 3 days' notice. Herein, the store manager's testimonial recitals, however, have been credited. Blum had been told, by Controller Sarraco, that Shine Building Maintenance's janitorial services would be extended to Store No. 5's bakery department and deli section, starting with August's first full week; mindful of this, the store manager would hardly have been likely to give Perez and Scheiderer July 31 notices that they faced termination *2 weeks* later. Nothing within the Bakery Workers Union contract required such forehanded notices when workers were to be laid off or dismissed; Blum's determination to give Respondent's bakery cleanup personnel the *3-day* notice required for grocery clerk terminations consistently with sec. 3.2 of his firm's Food and Commercial Workers contract—therefore—reflected a logical, and reasonably probable, decision. Having so decided, Respondent's store manager would have, most likely, given the workers concerned notice directly when their Thursday, July 31 shift *began*, so that they could work three regular part-time shifts before their Saturday August 2 departure. I have so found.)

When queried with regard to Brum's proffered reason for their termination, Perez recalled—merely—that Respondent's store manager had said their services were no longer required, because a janitorial service was being retained to perform their work. Brum testified that they were told Respondent was "disappointed" with their work, and would procure a janitorial service replacement. With respect to this portion of their brief conversation, I credit Perez' witness-chair recapitulation; if Store No. 5's manager, incidentally, mentioned Respondent's purported dissatisfaction with Perez' and Scheiderer's work, I am satisfied that his comment, en passant, was neither proffered, nor recognized by Perez, particularly, as Respondent's prime motivational factor for their termination.

Perez and Scheiderer, I find, did not finish their July 31 shift. Sometime between 2 and 2:30, they reported to Store No. 5's checkstand, where their paychecks for the previous calendar week were, presumably, being held. (As previously noted, Thursday, July 31, was Respondent's regular payday; checks for the firm's store employees, covering their services for a July 20-July 26 pay period, had—routinely—been prepared for distribution.)

Brum, having observed them standing at Respondent's checkstand, sent a head clerk, Harry Propp, to determine their purpose. Perez and Scheiderer declared they were "leaving" forthwith. Apprised of this, Blum provided both of them, I find, with Respondent's regular "Exit Interview" forms. Perez returned his form partially completed; the record, with respect to Scheiderer's reaction, reflects Perez' recollection—merely—that his fellow worker said his heart would not be in working, and that he did not want to "hand" around. (Proffered for the record, Perez' form reveals that he named Respondent's "bakery" as his department, that he checked "Resignation" to designate his type of termination; that he printed the word "resigned" when requested to note the reason for his separation; that he dated the document, and that he supplied his name written in script.)

Upon returning their "signed" forms, both cleanup workers received their regular paychecks. The record shows that the firm's July 20-July 26 payroll period was the first period for which Perez was compensated at Respondent's newly agreed-upon $4.60 hourly rate, for bakery cleanup personnel. Both Perez and Scheiderer then left Respondent's premises.

3. Subsequent developments

a. *Perez files a charge*

Subsequent to the departure of Store No. 5's bakery cleanup workers, Shine Building Maintenance provided Respondent with bakery and deli cleanup services. The record, however, warrants a determination—which I make—that Shine was required, merely, to clean floors, within the departments designated. Respondent's bakers were, concurrently, required to take responsibility for washing their pots, pans, and related equipment, and for cleaning their working tables. The record, herein, reveals that such tasks when performed by Store No. 5's several bakers required periods of service equivalent to one baker's time, for 1 hour daily. I so find.

On Saturday, August 9, Perez signed the charge which—ultimately—gave rise to this proceeding; he declared, therein, that he had been terminated because he "chose to join" the Bakery Workers Union. His charge, however, was not filed until Thursday, August 14, 5 days later.

Likewise, on the date last noted, secretary-treasurer Castillo wrote Respondent's controller. She reported her "understanding" that bakery cleanup work within Respondent's Store No. 5 had recently been subcontracted; noted that such work was "covered" pursuant to Respondent's collectively bargained contract with the Bakery Workers Union; and requested a statement regarding the "basis" for Respondent's decision to subcontract the store's cleanup work. On Monday, August 18, when Castillo's letter was received, Sarraco telephoned her; subsequently, so the record shows, he returned her letter with handwritten notations, summarizing the manner in which Store No. 5's bakery cleanup work had been divided, between Respondent's bakers and the firm's regular janitorial service.

Respondent received no notice, with respect to Perez' charge herein, until Thursday, August 21. Responding to the Regional Director's request, therein, for a statement of Respondent's position regarding the charge, Sarraco subsequently dispatched an August 27 letter. Therein, Respondent's controller reported, in relevant part, that:

> Since 1970, we have employed clean up personnel in our bakery departments . . . . These positions were paid in accordance with union contracts under the clean up rates. During 1980, the union informed us that since some of the time was involved in the washing of pots and pans that a higher rate of pay was necessary . . . . [A] rate agreeable to both of us and the union was placed into effect during the latter part of July 1980.
>
> *Due to the increased wages incurred for clean up personnel, the company decided to try using janitors to clean the floors, and journeyman bakers to wash utensils.* These new procedures are on a trial period and if successful will be used at all locations.
>
> Mr. Perez was given a three day notice of layoff on July 31, 1980, upon receiving the notice he walked off the job . . . . [*In*] *no way was his union status a factor in the operational changes.* [*Emphasis added.*]

Sarraco's letter contained no specific references to Scheiderer's concurrent receipt of 3 days' notice regarding his termination. Nor did it mention his July 31 resignation, prompted thereby.

The record warrants a determination—which I make, based on Sarraco's testimony proffered and received without objection—that Scheiderer was reemployed, sometime during the month of August, shortly following his termination. He worked for some "short period of time" performing meat department cleanup work within one of Respondent's markets; his services during this period were covered, so Sarraco's credible testimony shows, under Respondent's collective-bargaining contract with Meatcutters, Local 506. I so find.

b. *Respondent's plans further subcontracts*

As previously noted, Respondent's controller had notified the Bakery Workers Union, when responding to Castillo's August 14 inquiry, that Respondent had subcontracted the "cleaning of floors" within Store No. 5's bakery department, to a janitorial service, while "pan washing" had been reassigned to that store's bakers. Herein, both Sarraco and Castillo have testified that no grievance was ever filed with reference to Respondent's subcontracting decision, or that decision's subsequent implementation, within Store No. 5's bakery department.

Within a letter dated October 1, Respondent's controller subsequently notified Castillo that Respondent was "contemplating" the like removal of cleanup personnel within its two remaining stores containing bakery departments. Sarraco reported that:

> The work presently being performed by these people will be done by journeymen, with the exception of cleaning the floor areas. The floor will be done by a professional janitorial service which currently does all floor areas in our markets nightly.

Castillo was invited to communicate with Respondent, should the Bakery Workers Union desire to discuss the impact of this proposed change. Some 12 days after her receipt of Sarraco's letter, Castillo requested a meeting, during which the impact of Respondent's projected changes, together with their "appropriateness" under the Bakery Workers Union contract, could be discussed.

c. *The Union's reaction*

Subsequently, pursuant to Castillo's request, the Food Employers Council, functioning in Respondent's behalf, arranged a meeting which Controller Sarraco attended; the Union was represented by one David York, since Castillo, who had been summoned for jury duty, could not be present. With respect to their meeting's discussion, Sarraco testified that:

> He [York] did inform us that we did have the right to make this decision. His main concern was finding work for these people if we did lay them off . . . . We gave him our guarantee that if we found suitable—if we had suitable cleanup personnel that

would do a good job in other departments in the store, we would move them over.

When questioned with regard to York's report, following the meeting in question, Castillo conceded that he had reported discussions with regard to Respondent's right to subcontract cleanup work, and possible alternative employment for the firm's displaced cleanup personnel. She purportedly recalled, however, that he had, further, reported a consensus—merely—that a future meeting concerning these subjects "might" be held.

With matters in this posture, I credit Sarraco's testimony regarding the meeting's outcome; while a witness, Castillo conceded that no further meetings, with respect to either of the matters noted, was thereafter requested.

C. *Discussion and Conclusions*

1. Respondent's purported warning that Perez faced discharge

Resting his case on Perez' concededly uncorroborated testimony, the General Counsel seeks a determination, herein, that—when, sometime in July 1980, Store No. 5 Assistant Manager Floyd Wedel handed the bakery cleanup worker two envelopes containing union membership application forms—he commented, gratuitously, that should Perez join the Bakery Workers Union, he would be discharged.

As previously noted, however, Wedel's testimony reflects his categorical denial, inter alia, that Perez and Scheiderer were threatened with dismissal. Confronted with divergent recollections proffered by Respondent's assistant manager, the General Counsel's representative contends—shortly and simply—that Perez' testimony was more detailed, presented a more coherent picture, and should therefore be considered more trustworthy than Wedel's version, with respect to their conversation. I have not been persuaded.

While a witness, Perez struck me as basically straightforward but somewhat ingenuous; his proffered recollection reflect significant elisions, within my view. Though satisfied that his witness-chair recitals compass no deliberate prevarication or conscious contrivances, I found his testimonial presentation overly simplified, lacking in circumstantial detail save when he was prodded by questioners, and generally suggestive of vague or somewhat confused memories, significantly colored by post hoc rationalizations.

Previously, within this decision, Perez' testimony that Scheiderer had not been present, when Wedel handed over Mayall's two union envelopes and purportedly volunteered his discharge threat, has been noted; that testimony, which Wedel subsequently contradicted, has been herein rejected as contrary to reasonably probabilities. (Though the General Counsel never claimed, for the record, that Scheiderer was unavailable, he was never summoned to corroborate his fellow cleanup worker's testimony.)

I note further that Perez purportedly recalled Head Clerk Harry Propp's presence in Store Manager Blum's office, rather than Scheiderer, when Wedel's comment was allegedly made; Wedel and Propp both contradicted his proffered recollection. Their clear-cut, mutually corroborative testimony, within my view, merits credence.

The cleanup worker's testimony that he subsequently reported Wedel's purported threat to Mrs. Starrs, and Gayle Jacobson, Respondent's bakery department clerks, likewise stands rebutted. Jacobson's testimony, within my view, reflected simple candor; her witness-chair declaration that Perez proffered no such report, considered in context, carried the ring of truth.

As previously noted herein Perez testified that, when notified of his termination *between 4:30 and 5 o'clock* on July 31, he was given *2 weeks'* notice. Within this decision, however, Blum's testimony—that both cleanup workers within his store's bakery department were given *3 days' notice* of termination, merely, when their July 31 shifts began—has been credited; with due regard for Respondent's concededly regular, contractually sanctioned, practice in connection with grocery clerk terminations, and reasonable probabilities, that determination, within my view, merits reaffirmation.

While a witness, Perez conceded that—directly following his purportedly unsettling conversation with Respondent's assistant manager—he had, nevertheless, proceeded to compute what his prospective earnings might compass, should Respondent subsequently concede his entitlement to some higher contractually mandated hourly rate. He testified, however, that he had based his calculations on a prospective $4.60 hourly rate which—so far as the record shows—had not, *yet*, been conclusively negotiated for cleanup workers; the record reveals, rather, that—contrary to his purported memory—he had computed his prospective earnings based on a presumed, hearsay derived, $6 hourly rate.

With respect to various collateral matters dealt with throughout his testimony, Perez' memory stands revealed as relatively poor. He recalled a comment by Respondent's baker/decorator Mayall that bakery cleanup workers at the firm's Store No. 1 had joined the Bakery Workers Union; Respondent maintains no bakery department, however, within the store designated. The cleanup worker, further, purportedly recalled his notation on Respondent's proffered "Exit Interview" form that the firm's management had been bossy and pushy; the form—when proffered for the present record—contained no such comments. Perez testified that he had *not* noted his July 31 resignation on Respondent's form; that document, however, reflects his checkmarked concession, therein, that his cessation of work constituted a resignation, plus a further, misspelled, reference thereto. Inter alia, the cleanup worker purportedly recalled a bomb scare within Respondent's supermarket, during which Wedel had—so he testified—directed the store's temporary evacuation; Blum testified, credibly, that the bomb scare—rather—had directly concerned a Payless Drug Store next door.

With respect to several matters dealt with in Perez' testimony, his witness-chair proffers differed from his recollections recorded, previously, within a signed Board statement; when taxed with these differences, the cleanup worker contended that his prior statements—though pre-

sumably proffered when his memory was fresher—had been mistaken.

Within his signed statement, noted, Perez claimed he had never been told, by a management spokesman—prior to July 31 specifically—that a janitorial service would be retained to provide Respondent's bakery department cleanup services. While a witness, the cleanup worker conceded that Bakery Foreman Vitola had, however, mentioned that possibility, before his [Perez] July conversation with Respondent's assistant manager. Perez contended, nevertheless, that his unqualified prior statement had not—willfully or consciously—been erroneous, since he had not, then, considered Vitola a management representative.

Upon this record, I find that cleanup worker's pertinent testimony with respect to Wedel's purported threat—despite his patent sincerity and presumptive candor—lacking in trustworthiness, and less than persuasive. When compared with Wedel's contrary recollections, plus Respondent's collaterally corroborative testimonial proffers, the General Counsel's presentation, within my view, will not—*preponderantly*—sustain his contention regarding Respondent's purported threat that Perez might face discharge.

And since, within my view, the General Counsel's representative has—necessarily—failed, thereby, to sustain his required burden of proof, with respect to Wedel's statutorily proscribed threat, no determination would seem required regarding the assistant manager's purported supervisory status. Though thoroughly litigated, questions presented—upon this record—with regard to that issue, have not therefore been resolved.

2. Challenged terminations

This Board has, consistently, held that concerned employers violate the statute when they relocate their business facilities, *subcontract part of their business operations*, or modify those operations in some other respect, with a purpose to discriminate against their employees because those employees have exercised their right to organize, and bargain collectively. (When however, concerned employers move or close their plants or places of business, suspend portions of their regular business operations, or subcontract work which their employees have previously performed, *for purely economic reasons which bear no reasonably cognizable relationship to union conduct, with respect to which such employees may have been concerned, or whereby their wages, hours, and conditions of work may have been affected*, employee dismissals resulting therefrom have never been considered unfairly discrminatory. Employers have consistently been considered free to terminate or lay off workmen for general business reasons, so long as the purpose or necessary consequence of their conduct has not been to discourage employees, with particular reference to their exercise of rights statutorily protected.)

Decisions to subcontract particular functions, previously performed by a concerned employer's workmen, may of course be predicated on legitimate labor cost considerations, without flouting the statute's mandate. Cf. *Fibreboard Paper Product Corp.*, 130 NLRB 1558, 1559, 1571–73, 138 NLRB 550, enfd. sub. nom. *East Bay Union of Machinists, Local 1304 v. NLRB*, 322 F.2d 411, 413, 415, (D.C. Cir. 1963), cert. denied as to dismissal of 8(a)(3) charges, 375 U.S. 963 (1964). Nevertheless, the fact that some employer may have had legitimate economic reasons, for a challenged subcontracting decision, will not render consequent employee terminations privileged, when a purpose to deny or limit their right to participate in, or reap the fruits of collective bargaining, or concerted activity for their mutual aid and protection—statutorily guaranteed—constituted a concurrent motivating reason.

Herein, the General Counsel's case, clearly, turns on his primary contention that Respondent's negative reaction—when confronted with the consequences of Local No. 24's persuasive grievance prosecution regarding the wage rates and fringe benefit coverage which the firm's bakery cleanup personnel were contractually qualified to receive—constituted a cognizable "motivating factor" with respect to Controller Sarraco's decision to reassign part of their work, and subcontract the balance.

Consistently with this Board's recently articulated decisional rubric relative to so-called "dual motivation" cases, therefore, some determination must—initially—be reached herein, with respect to whether the General Counsel has persuasively demonstrated, prima facie, that Respondent's conceded desire to avoid the high cost consequences of Local No. 24's contractually grounded grievances prosecution constituted "a" motivating factor with respect to Sarraco's challenged decision. See *Wright Line*, 251 NLRB 1083 (1980); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), in this connection. Within my view, the General Counsel's representative has, persuasively, sustained his contention, in that regard.

Respondent's statement of position, with respect to Perez' charge filed herein, which Controller Sarraco submitted to this Board's Regional Office shortly thereafter, reports the firm's sole basis for reassigning and subcontracting the work previously performed by Store No. 5's bakery cleanup personnel. Respondent's controller declared, in that connection, that his decision had been reached "due to the increased wages incurred" with respect to such cleanup workers. Concededly, however, Respondent's commitment to pay those "increased wages" coupled with the firm's newly confirmed commitment to provide health and welfare and pension plan coverage for cleanup personnel, within its three stores with bakery departments, had derived directly from Local No. 24's prior, contractually grounded, grievance prosecution. That grievance had, of course, been bottomed on Local No. 24's contention that wages, hours, and working conditions for Respondent's bakery cleanup personnel should have been considered governed by Respondent's currently viable collectively bargaining contract; that such personnel, inter alia, were performing potwasher functions; that they were therefore entitled to wage rates equivalent to those contractually specified for potwashers; and, finally, that health and welfare and pension plan payments for contractually qualified bakery cleanup personnel should, henceforth, be considered required. In short, Respondent was not confronted with prospectively "higher costs" bottomed on purely *busi-*

ness-related considerations; Sarraco's decision to subcontract bakery cleanup work, rather, reflecting his reaction to *union-related* developments. With respect thereto, Respondent's controller testified:

> Q. This [August 27, 1980] letter was sent to the Labor Board to explain the circumstances under which this subcontracting took place, correct?
>
> A. I am not sure . . . .
>
> Q. Okay, but apparently from the words contained in the document, this is an explanation of the reason why the subcontracting took place when it did.
>
> A. Yes. . . .
>
> Q. And in the second paragraph you explained the reason for the decision to subcontract, which is due to the increase[d] wages incurred for clean-up personnel. And that was the reason for your decision to subcontract, correct?
>
> A. It is one of the reasons, yes . . . It is the only reason in the letter. . . .
>
> Q. So the reason that the decision was taken basically due to the increased wages as it says in the letter?
>
> A. That was one of the reasons. It wasn't the only reason. . . . It is the only reason in the letter. . . .
>
> Q. Do you recall about the first time that P. W. began to consider subcontracting out this work?
>
> A. The first time I became aware of it was the end of May sometime.
>
> Q. And one of the things that prompted this to take place was the increased wages. . . that the clean-up personnel were going to receive?
>
> A. That was one of the factors, yes. . . .
>
> Q. A change was made or was pending at that time in the wage rate that these people were going to receive, these clean-up personnel, correct?
>
> A. Yes, that is correct.
>
> Q. Also, it was around that time that P. W. realized that they were going to have to pay health and welfare payments toward these clean-up personnel . . . and I guess also pension payments, correct?
>
> A. Yes.
>
> Q. All these items became quite costly at P. W. didn't they?
>
> A. Yes they did.
>
> Q. *And it was for this reason, this was one of the major reasons why P. W. decided to look into subcontracting out the work? Or actually let's put it this way. This was one of the major reasons P.W. decided to subcontract out the work?*
>
> A. *I am not sure if I will agree with the major reason. It was an important reason. But there are other reasons as well.* . . .
>
> Q. You thought it would cost less money to do it that way?
>
> A. We knew it would cost. . . . We knew what it would cost before we made the decision to do it. It was going to cost less money, yes. . . .
>
> Q. And if you had done this computation and it had cost more money, you wouldn't have implemented this decision at that time, obviously?
>
> A. That is correct. [Emphasis added.]

With due regard for Sarraco's testimony, determinations would clearly be warranted, within my view, that Respondent's decision to reassign necessary "pot washing" functions within Store No. 5 particularly, to subcontract with a currently retained janitorial service regarding the store's further bakery and deli section cleanup requirements, and to dispense with the services of Store No. 5's regular part-time cleanup workers, who had—theretofore—been providing such services, derived specifically from the firm's desire to forestall certain prospective wage rate changes and fringe benefit contribution requirements. And—since those prospective rate changes and contribution requirements would, concededly, have been bottomed on Respondent's currently viable collectively bargained commitments to consider directly hired bakery cleanup personnel compassed within Local No. 24's comprehensive, *contractually defined*, three store bargaining unit, previously noted, to provide definitive, *contractually mandated*, health and welfare and pension fund contributions on their behalf, and to grant them higher hourly rates consensually negotiated in connection with a *contractually grounded* grievance settlement—there can be no question, now, that Respondent's subcontracting and consequent termination decisions had been precipitated by, and necessarily reflected, the firm's purposive "avoidance" disposition with respect to particular *collectively bargained* obligations. Compare *Brown-Dunkin Co.*, 125 NLRB 1379, 1385–86 (1959), affd. 287 F.2d 17, 19–20 (10th Cir. 1961), in this connection. Thereby, Store No. 5's bakery cleanup workers—whether or not they were, currently, Bakery Workers Union members—were, necessarily, deprived of contractually defined benefits which their recognized collective-bargaining representative had theretofore negotiated.

Respondent's course of conduct, therefore, clearly merits characterization as conduct "inherently destructive of employee interests" which may properly be deemed statutorily proscribed, despite management's testimonial proffers calculated to suggest that the firm's subcontracting and termination decisions had been motivated by business considerations. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 32–34 (1967). Sarraco's purported justification—that some subdivision of bakery department cleanup work, coupled with subcontract arrangements whereby the major portion of such cleanup work would be performed by a janitorial service, would provide Respondent, prospectively, with significant cost savings—cannot vindicate conduct which was, in fact, reasonably calculated to deprive Store No. 5's employees for benefits, negotiated and confirmed pursuant to collective-bargaining processes by their recognized collective-bargaining representative. Cf. *Mrs. Baird's Bakeries*, 189 NLRB 606 (enfd. 457 F.2d 512 (5th Cir. 1972)), citing *Metromedia, Inc. (KLAC)*, 182 NLRB 202 (1970), in this connection. As the Board's noted—within both decisions last cited—the unlawfulness of Respondent's conduct, within the statute's contemplation, is in no way minimized or af-

fected by the fact that its responsible management representative may have concluded, reasonably, that compliance with his firm's contractual commitments and negotiated grievance settlement would cost money prospectively. If such purported business considerations could justify discrimination, various proscriptions and protections set forth within the National Labor Relations Act, which that statute purports to guarantee, would be rendered largely nugatory.

With matters in this posture, the General Counsel's representative has, within my view, persuasively demonstrated, prima facie, that a purpose to foreclose Store No. 5's bakery cleanup workers from prospective hourly rate increases, health and welfare benefits, and pension plan coverage—which their recognized collective-bargaining representative had, theretofore, successfully negotiated through contractually specified grievance procedures, pursued particularly in their behalf—constituted "a" motivating factor for Controller Sarraco's decision to reassign their limited "potwashing" functions to Respondent's journeyman bakers, to subcontract their primary floor cleaning work to his firm's previously retained janitorial service, and command their termination.

(The record, herein, reveals—clearly—that Respondent's decision was motivated, directly, by Sarraco's freely declared desire to preclude prospectively higher business costs generated, particularly, by statutorily protected conduct. Respondent proffers no contention that management was, otherwise, confronted with prospectively greater expense consequent upon discrete, *business-related*, development calculated to suggest that some cost retrenchment would be necessary. Compare and contrast *Liberty Homes Inc.*, 257 NLRB 1411, 1412 (1981), in this connection. Further, Respondent's reord showing regarding the *timing* of Sarraco's decision, together with that decision's implementation, would belie any contention that his motivation derived from business considerations other than those generated by Local No. 24's persuasive grievance prosecution. Respondent's controller, concededly, began considering the possibility of subcontracting bakery department cleanup work—following a suggestion which Store No. 5's manager had transmitted—several weeks *after* Local No. 24's April 1980 wage rate and benefit coverage claims had been presented, on behalf of those workers directly concerned. His definitive decision to reassign part of their work and subcontract the balance, within Store No. 5 particularly, was patently reached—so the record shows—shortly *after*, Respondent's concession that its bakery cleanup workers would be considered eligible for contractually defined health and welfare benefits, and pension plan coverage; further, Sarraco's decision—concededly—likewise *followed* Respondent's final July 1980 concession, proffered to settle Local No. 24's grievance claims, that bakery cleanup personnel who performed pot washing work would be granted a substantial hourly rate raise. The firm's subcontracting decision was, subsequently, implemented shortly *after* Respondent's revised wage rate proposal, for bakery cleanup workers generally, had been formally presented to Bakery Workers Union representatives, and less than 2 weeks subsequent to the commencement of Respondent's pay period within which those wage rate increases, when consensually approved, were scheduled to become effective. Compare and contrast *Liberty Homes, Inc.*, supra in this connection. Sarraco's testimonial concession—that, before its decision was reached, Respondent was fully cognizant of the prospective savings in contractually mandated and negotiated labor costs which subcontracting would make possible—has, previously herein, been noted.)

Concerned employers cannot, lawfully, eliminate jobs—and, consequentially, terminate employees—where newly realized economic considerations, generated by and derived from unionization particularly, constitute a moving cause.

This Board has, specifically, held that—when a worker's discharge has been precipitated by a newly generated or newly recognized necessity for paying his wages, and/or conceding his right to claim fringe benefit coverage, consistently with the requirements of some extant collective-bargaining agreement—that discharge violates the statute. See *Harry Tancredi*, 139 NLRB 1510 (1962), 51 LRRM 1531, particularly, in this connection. (The Trial Examiner's published Supplemental Intermediate Report and Recommended Order with reference to the case noted—which this Board subsequently "adopted" without qualification—cannot be found within some Board Decision volumes. His report and recommended order will, however, be found—summarized—within the LRRM volume cited. Copies have been supplied, for Respondent's counsel and for my information, with the General Counsel's brief herein.)

Employees cognizant with regard to Respondent's conduct would, certainly, recognize its clearly implicit message. And that message's recognition, necessarily, would—as the General Counsel's representative cogently notes—tend to chill their future participation in protected activity, particularly their readiness to file presumptively justified grievances, or their disposition to seek wage increases. With matters in their present posture, then, proof calculated to establish some further *overt* manifestation of Respondent's statutorily proscribed motivation need not be considered required. *NLRB v. Great Dane Trailers*, supra. Nothwithstanding the General Counsel's failure to produce testimonial or documentary evidence specifically probative of management's presumptive animus, Respondent's purported frugality cannot—so I find—vindicate conduct realistically calculated to deprive employees of benefits derived through their personal exercise of rights statutorily guaranteed, or through reliance on their collective-bargaining representative's pursuit of such rights particularly in their behalf.

Since the General Counsel's representative has—within the present record—demonstrated, prima facie, that statutorily prohibited considerations were "a" motivating factor which influenced Controller Sarraco's subcontracting decision, this Board's currently relied on *Wright Line* test shifts, directly to Respondent herein, the burden of persuasion that this facially impermissible motivating factor was really irrelevant, and that it would have reached the same decision, and taken the same action, had that factor been absent. Cf. *Statler Industries v. NLRB*, 644 F.2d 902 (1st Cir. 1981), and cases therein

cited. Upon this record, Respondent has not, within my view, satisfied that burden.

True, the record shows that Respondent's particular problems, with reference to significant "turnover" within Store No. 5's bakery department cleanup crew, and that store's recurrent "write ups" for sanitation inadequacies, had presumptively given birth to Sarraco's consideration of subcontracting. (Reliance on some outside janitorial service for cleanup work had, first, been suggested by one of Store No. 5's bakers. His suggestion had been conveyed to Foreman Vitola; the latter had relayed it to Store No. 5's manager, who had subsequently communicated with Respondent's controller.)

There can be no doubt, however, that—when Store Manager Blum transmitted Vitola's subcontracting suggestion to his headquarters superior—he "knew" that Respondent's bakery cleanup personnel would be getting raises; with due regard for Blum's testimonial concession, I so find. While a witness, Blum conceded further that his knowledge, in that regard, may have played some "small part" when he suggested a possible subcontract to Respondent's controller; and Sarraco testified—when queried by the General Counsel's representative—that Store No. 5's manager had, inter alia, mentioned Respondent's prospective confrontation with "increased costs" when he suggested some possibly alternative janitorial service commitment.

Regardless of what the record may show, however, with respect to Store Manager Blum's concern regarding the cleanliness of his store's bakery department, and cleanup crew turnover, determinations would seem to be warranted—clearly—that Sarraco was "more worried" regarding money matters; while a witness, he so reported. Further, he conceded—so his testimony, previously noted herein, shows—that, *had there been no prospective cost savings*, his decision to subcontract a major portion of Store No. 5's bakery department cleanup work would not have been implemented when it was.

With matters in this posture, then, Respondent has clearly failed to demonstrate—herein—that its challenged course of conduct would have been pursued, even in the absence of prospectively increased wage and fringe benefit coverage costs for cleanup personnel. And, since those prospective cost increases would, clearly, have been attributable directly to Local No. 24's pursuit of rights currently contractually guaranteed or newly negotiated for those workers concerned, Respondent has—necessarily—failed to prove "by a preponderance of evidence" that its challenged course of conduct would have been pursued, had Local No. 24's protected conduct not been undertaken.

Conclusions would, therefore, clearly seem warranted that Respondent's decision to subcontract most of Store No. 5's bakery cleanup work, together with its consequent decision to dispense with the services of that store's previously hired cleanup personnel, constituted interdictory discrimination, with regard to their hire and job tenure, for statutorily proscribed reasons. I so find.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Respondent's course of conduct set forth in section III above—since it occurred in connection with Respondent's business operations noted in section I above—had, and continues to have, a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States. Absent correction, such conduct would tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

In view of these findings of fact and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Respondent, P. W. Supermarkets, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 24, Bakery Confectionery & Tobacco Workers International Union, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. When Respondent reassigned certain functions, previously performed by cleanup personnel within Store No. 5's bakery department particularly, to journeyman bakers; subcontracted certain further cleanup work, which such personnel had theretofore been performing, with a janitorial service; and consequentially terminated the employment of Alfonso Perez and John Scheiderer, Store No. 5's regular, part-time bakery department cleanup workers, the firm discriminated against these employees with respect to their hire and tenure of employment, and further interfered with, restrained, and coerced employees, generally, with respect to their exercise and enjoyment of rights statutorily guaranteed. Thereby, Respondent has engaged, and continues to engage, in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Since I have found that Respondent has committed, and has thus far failed to remedy, certain specific unfair labor practices which affect commerce, I shall recommend that they be ordered to cease and desist therefrom, and to take certain affirmative action, including the posting of appropriate notices, designed to effectuate statutory policies.

Specifically, I have concluded and found that Section 8(a)(3) and (1) of the statute were violated when Respondent reassigned Store No. 5's bakery department potwashing work, subcontracted with a janitorial service for the performance of further departmental cleanup functions, and, consequentially, terminated the employment of Store No. 5's regular, part-time bakery cleanup workers, for statutorily proscribed reasons.

Heretofore, when comparable conclusions have been found warranted, this Board has normally promulgated remedial directives calculated to restore the situation

which existed before the Respondent concerned committed the particular unfair labor practices found. Employers have been required to cancel or suspend subcontracts, to resume their direct responsibility for performance of the particular functions involved, and to reinstate dismissed employees, with "make whole" payments calculated to recompense them for whatever backpay and benefits they may have lost by reason of their unlawful terminations. Cf. *Jays Foods, Inc.*, 228 NLRB 423, 424, 438 (1977); *Townhouse T.V. & Appliances*, 213 NLRB 716, 717, 723 (1974); *A-1 Excelsior Van & Storage*, 165 NLRB 427, 429 (1967); *Town & Country*, 136 NLRB 1022, 1028–30 (1962). Such directives have constituted the Board's remedy of choice, particularly when the records submitted for review have warranted determinations that a compelled resumption of suspended and/or subcontracted operations would create no undue hardship. Compare *Statler Industries v. NLRB*, supra, in this connection.

With matters in their present posture, however, remedial directives calculated to require a full scale restoration of the status quo ante herein, with reference to Respondent's Blossom Hill Road store particularly, would—within my view—produce a significantly anomalous situation.

I note, in this connection, that the General Counsel's complaint herein—consistently with Perez' charge from which it derives—raises no questions regarding the propriety of Respondent's subcontracting decision, per se, or the propriety of that decision's subsequent effectuation, save for his challenge regarding the decision's impact *directly* on Perez' and Scheiderer's job tenure, within Respondent's Store No. 5 particularly. (Though he could, clearly, have done so, complainant herein filed no charge that their termination derived from Respondent's disregard for its statutory duty to bargain collectively, concerning a subcontracting decision.)

And the record, herein, reveals further that their contractually recognized bargaining representative, Local No. 24 of the Bakery Workers Union, when notified—following its related query regarding Respondent's purported "basis" for negotiating subcontract arrangements with respect to Store No. 5's cleanup work—that such arrangements had been made, filed no contractually grounded grievance. Local No. 24, likewise, filed no 8(a)(5) charges with respect to Respondent's course of conduct. In short, Respondent's presumptive right to subcontract work covered by Local 24's contract, within Store No. 5 particularly—save when such conduct may have, demonstrably, derived from a purpose to discriminate against contractually covered workers for reasons statutorily proscribed—has not, herein, been questioned.

The record, likewise, reveals that Local 24's representatives—when subsequently notified that Respondent's management was "contemplating the removal of cleanup personnel" within its two remaining bakery departments, pursuant to arrangements whereby some cleanup functions would be performed by journeyman bakers while floor areas would be cleaned by a professional janitorial service—proffered no protest. They declared their "main" concern, merely, that some alternative work be found for cleanup workers who might be laid off; Respondent's controller, responsively, proffered his firm's guarantee that suitable cleanup personnel who "would do a good job" within other store departments would be given reassignments. (The record suggests, however, that Respondent may not have proceeded, further, with its contemplated reassignment and subcontracting arrangements. While a witness, Sarraco reported that he had not yet "implemented" subcontracting plans with respect to Respondent's two remaining bakery departments. He declared he was not "sure" that Store No. 5's current arrangement was "working out" consistently with Respondent's desires; further, he testified that he had not had time to discuss possible cleanup work subcontracting with bakery department personnel, within the stores concerned, or to determine their views.)

Thus, Respondent's managerial prerogatives, with respect to setting up subcontract arrangements for cleanup work within *additional* bakery departments, have not been challenged contractually; neither have they been, hus far, questioned as reflective of some possible disregard for the firm's statutorily mandated bargaining duty.

With matters in this posture, the possibility exists—clearly—that Respondent may, *within its discretion*, subcontract floor cleanup work within *two* of *three* bakery departments, and dispense with the services of directly hired cleanup personnel, therein, without let or hindrance; conceivably, by the time this decision issues, the firm may—indeed—have done so. In that case, Board directives calculated to require a restoration of the status quo ante within Store No. 5 solely would, necessarily, subject Respondent to cost burdens—there—which it could, freely foreclose within its remaining stores. Further, should their reinstatements within Store No. 5's bakery department forthwith be required, Perez and Scheiderer would be thereby vested with a privileged status—purely by virtue of their fortuitous prior selection as bellwethers, for Respondent's subcontracting program, under circumstances herein found statutorily proscribed—which their fellow cleanup workers, within Respondent's two remaining stores, could never claim.

Mindful of these possibilities, I shall not recommend a reversal of Respondent's decision to subcontract floor cleaning functions, within Store No. 5's bakery department and deli section particularly.

However, with respect to Perez and Scheiderer, certain remedial directives, within my view, should be considered necessary and proper. I shall recommend: *First*, that Respondent be required to offer Perez, particularly, reinstatement to some substantially equivalent position within one of the firm's several stores, without prejudice to his seniority or other rights and privileges.

(This record suggests that—subsequently to Scheiderer's receipt of Store Manager Blum's July 31 notice of termination, and his consequent cessation of bakery department cleanup work prior to his 3-day notice period's conclusion—that cleanup worker designated had been offered, *and had accepted*, renewed employment with Respondent, within a possibly "equivalent" position. Should it be determined—during negotiations concerned with Respondent's compliance obligations hereunder, pursuant to various remedial directives which will be found set forth herein—that Scheiderer was not re-

hired for substantially equivalent work, Respondent should be required to offer him reinstatement to such work, on terms consistent with those hereinabove set forth, in connection with Perez' right to reinstatement. Should it be determined that Scheiderer was offered substantially equivalent work, which he was rehired to perform, Respondent's obligation to offer him reinstatement should be considered discharged.)

Second, should no substantially equivalent positions be currently available, wherein Perez, and possibly Scheiderer, might be reinstated, Respondent should be required to list them as preferential applicants for such work, and thereafter offer them reinstatement, whenever such substantially equivalent work becomes available; *third*, should Respondent hereafter determine, within its discretion, to cancel subcontract arrangements for cleanup work within Store No. 5's bakery department and deli section, and to hire cleanup personnel directly for such work, Perez and Scheiderer should be, preferentially, offered reinstatement to their positions formerly held.

Respondent should, further, be required to make Perez and Scheiderer whole, for any pay losses which they may have suffered, or may hereafter suffer, by reason of the discrimination practiced against them, by the payment to them of sums of money equal to the amounts which each of them would normally have earned as wages, from the date of their discriminatory termination, herein found, to the date or dates on which Respondent may have, heretofore, offered them reinstatement to substantially equivalent employment, or the dates on which such reinstatement may be offered, or, alternatively, to the date or dates of their placement on Respondent's preferential hiring list, hereinabove prescribed. (The fact that Perez and Scheiderer concededly resigned—directly consequent on their terminations herein found unlawful, and prior to the conclusion of Respondent's 3-day notice period with respect to their employment tenure—should not relieve Respondent from its responsibility to make both of them whole for any losses which they may have suffered by virtue of their discriminatory treatment at Respondent's hands. Compare *Mars Sales & Equipment Co.*, 242 NLRB 1097 (1979), in this connection. Respondent should, however, be considered free to contend and seek to prove—during the compliance stage of this proceeding—that Perez and Scheiderer incurred a willful loss of earnings when they ceased work prior to their notice period's expiration.) Whatever backpay Perez and Scheiderer may be entitled to claim should, however, be reduced, to the extent of their separately computed net earnings during the period or periods hereinabove designated. Their backpay should be computed by calendar quarters, pursuant to the formula which this Board now uses. *F. W. Woolworth Co.*, 90 NLRB 289, 291–296 (1950). Interest thereon should likewise be paid, computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 631 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962), in this connection.

Respondent should further be required to make whatever contributions its 1978–1981 contract with Local No. 24 of the Bakery Workers Union, or any successor contract, may have prescribed or may currently prescribe, to health benefits and pension funds, on behalf of both designated discriminatees herein, covering their backpay period or periods previously defined. Since the record warrants no determinations, presently, with regard to Respondent's precise contractual liability for health benefits and pension fund contributions which the firm presumably failed to provide, no provisions for possible interest due, with respect to fund payments withheld, will be set forth herein; calculations with respect to whatever interest Respondent owes may be left to this proceeding's compliance stage. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), in this connection.

[Recommended Order omitted from publication.]